Supreme Court of the United States

OCTOBER TERM, 1931.

No. 630.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD.,

Complainant-Appellant,

against

GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK,

Defendant-Respondent.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT

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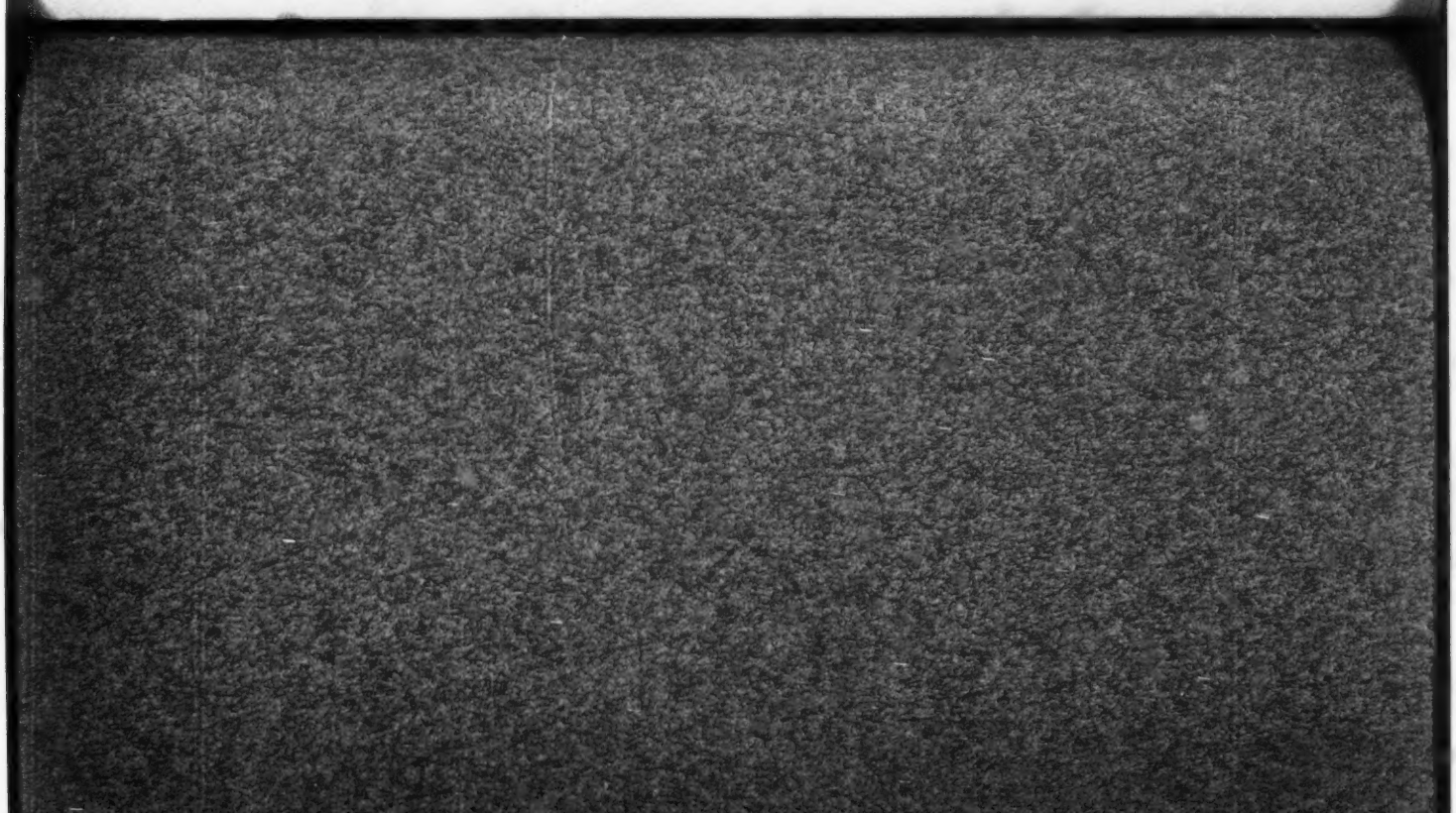

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against

GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK.
Defendant-Respondent.

No. 639.

Appeal from the District Court of the United States for the Southern District of New York.

Brief for Appellant.

This appeal has been taken to review a final decree in favor of the defendant, entered October 31, 1921, dismissing the Bill of Complaint herein. (R. 56.)

This action was tried on September 1st, 1921, before Honorable Julius M. Mayer, sitting in equity without a jury, on the motion of the plaintiff on the Amended Bill of Complaint and Answer for a decree for the relief demanded in the complaint. (R. 49.)

The opinion of the Trial Judge appears R. 50-56.

The facts set forth in the Amended Bill and Answer are not disputed and are as follows:

The complainant, a British corporation, contracted with Gilmour, Thompson & Company, of Glasgow, Scotland, to transport five cases of whiskey from Glasgow to Hamilton, Bermuda, there to be delivered to Burrows & Company, agents of Gilmour, Thompson & Company. These cases were shipped on complainant's S.S. "Cameronia," which sailed from Glasgow July 17, 1921, and arrived at the Port of New York on July 27th. (R. 18.)

These cases were to be transshipped in the Port of New York from the "Cameronia" to a vessel of another British corporation, the Quebec Line, running from New York to Bermuda. Both the appellant's vessels and the vessels of the Quebec Line are British steamships of British registry and flying the British flag, and Bermuda is a British possession. (R. 18.)

The cases of whiskey are covered by a through bill of lading from Glasgow to Burrows & Company in Bermuda. A bill of lading also accompanies the shipment to New York calling for the delivery of the cases at the Port of New York to the Quebec Line. (R. 18.)

The respondent threatened to seize these cases under instructions received from the Treasury Department, dated July 8, 1921, which advised him to refuse transportation and exportation entries for all intoxicating liquors not covered by a prohibition permit. (R. 18). A prohibition permit is issued for liquor to be used for other than beverage purposes. These instructions stated that this direction was given pursuant to an opinion of the Attorney General.

The opinion thus referred to is one issued under date of February 4, 1921. A copy of it is annexed to this brief as Appendix A.

By order of the District Court, the marshal took possession of these five cases of whiskey on arrival of the "Cameronia" and holds them pending the decision of this case. (R. 49.)

The appellant for many years as a part of its business has carried liquors from Glasgow to the Port of New York, where such liquors have been transshipped to destinations in the British possessions in America and to foreign ports in the Gulf of Mexico and South America. (R. 15.)

This carriage by the appellant of liquors, to be transshipped in New York, has yielded a large revenue to the appellant and has continued since the adoption of the National Prohibition Act. (R. 15.) Figures stated in the bill show that for the last three years the freight earned on this carriage was £9644. (R. 21-22.)

If this carriage is now prevented by the stoppage of these "intransit" shipments, liquor will be sent from Great Britain to the British West Indies and South American countries by other routes and the appellant will suffer a severe loss, for which it has no adequate remedy at law. And if such shipments should continue to be made for transshipment in the Port of New York, there will be seizures here which will involve a multiplicity of suits.

The Amended Bill of Complaint prays that the defendant be enjoined and restrained from enforcing against the complainant any of the penalties provided by the National Prohibition Act on the ground that transshipping liquors in a port of the United States under the provisions of

Section 3005 of the Revised Statutes, although shipped from and destined to foreign countries, is contrary to law, and that the defendant be further enjoined from refusing to issue to the complainant permits for such transshipment.

Appellant contends that the Trial Court was in error in dismissing the Bill of Complaint, and that the Secretary of the Treasury exceeded his authority in directing the defendant to stop transshipments of liquor. Appellant accordingly presents the shipment of these five cases from Glasgow to Bermuda as a test case.

The National Prohibition Act, adopted October 28, 1919, provides (Title II, Section 3) as follows:

> "No person shall on or after the date when the eighteenth amendment to the constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The question here presented is whether the above provision prohibits this transshipment.

Specification of Errors Relied Upon.

The appellant claims that the District Court erred:

(1) In holding that Section 3005 of the Revised Statutes has been repealed by the Act of Congress of October 28, 1919, known as the National Prohibition Act (R. 58).

(2) In holding that Section 3005 of the Revised Statutes which relates to the transshipment of merchandise in bond does not apply to intoxicating liquors for beverage purposes, although they are to be used without the United States, and that the National Prohibition Act prohibits "in transit" shipments of liquor for beverage purposes touching at ports of or moving through the United States though the same originate in and are destined to foreign countries (R. 58).

(3) In interpreting the National Prohibition Act so as to render said act unconstitutional and void (R. 59).

(4) In failing to hold that Congress was without power under the Eighteenth Amendment to the Constitution of the United States to prohibit the transshipment of liquor in ports of the United States or moving through the United States when the same originate in and are destined to foreign countries (R. 59).

(5) In holding that the Eighteenth Amendment to the Constitution of the United States prohibits the transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to foreign countries (R. 59).

(6) In holding that Title II of the Act of Congress of October 28th, 1919, known as the National Prohibition Act, prohibits the transshipment of liquor for beverage purposes touching at ports of the United States, though the same originate in and are destined to foreign countries (R. 59).

(7) In failing to hold that transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country is permitted by the treaties between the United States and Great Britain, particularly the treaty of May 8th, 1871, ratified June 17th, 1871, and proclaimed July 4th, 1871, and particularly Article XXIX thereof (R. 59).

The contention of the appellant here is (1) that it was not the intention of Congress to have the National Prohibition Act apply to these transshipments (Points I to XI inclusive): (2) that it was not the intention of Congress in passing the National Prohibition Act to revoke Article XXIX of the Treaty of Washington which permits these transshipments (Point XII).

POINT I.

The Eighteenth Amendment and the National Prohibition Act do not purport to apply to the use of intoxicating liquor outside of the United States.

It is claimed by the Government that Section 3 of Title II of the Prohibition Act applies to the transshipment here involved. That section reads as follows:

> "Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport,

> import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The general rule of construction requires that this clause be read in its entirety, and as so read the various acts which are prohibited—that is, manufacturing, selling, bartering, transporting, importing, exporting, etc.—are each prohibited "to the end that the use of intoxicating liquor as a beverage may be prevented."

If we then inquire where this is to be prevented, the answer appears in the Eighteenth Amendment, which reads:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States and all territory subject to the jurisdiction thereof* for beverage purposes is hereby prohibited. (Italics ours.)

It thus expressly appears from the amendment that it is to prevent the use of intoxicating liquors as a beverage only within the United States and territory subject to the jurisdiction thereof.

The liquor to be transshipped in this case was to be used in Bermuda and therefore the Prohibition Act does not apply to this transshipment.

POINT II.

An intention ought not to be attributed to Congress to interfere with the use of liquor as a beverage outside of United States territory.

The National Prohibition Act was aimed to prevent the use of alcoholic liquor as a beverage in the United States and territory subject to the jurisdiction thereof and it would seem to be stating a self-evident proposition to say that an Act of Congress intended to regulate the habits of the people was intended to apply where Congress had jurisdiction and not where Congress did not have jurisdiction.

In *American Banana Co.* v. *United Fruit Co.* (213 U. S. 347), this subject was discussed and, after considering the rule as to the territorial application of the statutes, the Court said,—Mr. Justice Holmes writing, (page 357):

> "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. 'All legislation is *prima facie* territorial.' *Ex parte* Blain, *In re* Sawers, 12 Ch. Div. 522, 528; State *v.* Carter, 27 N. J. (3 Dutcher) 499; People *v.* Merrill, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legisla-

tion, not all that the legislator subsequently may be able to catch. * * *"

The reluctance of American Courts to apply local statutes so as to interfere with business arrangements which were legal in the jurisdiction where the business originated is shown in *Milliken* v. *Pratt*, 125 Mass. 374, where a Massachusetts Court enforced a guaranty made by a married woman living in Massachusetts, although the law of Massachusetts did not allow her to make such contract, the reason for this action being that the guarantee was delivered and acted upon in Maine where married women were not under such disabilities.

POINT III.

Where Congress has intended to prevent the transshipment in American ports of merchandise moving from one foreign country to another it has expressly provided to that effect.

Congress is presumed to have been familiar with the history of the legislation in regard to transshipment of smoking opium, and the history of the passage of those acts is material in determining the intention of Congress in the instant case.

Section 1 of the Act regulating the importation of opium (35 Stat. L. 614; 38 Stat. L. 275-276) made it unlawful "to import into the United States" opium, but contained a proviso permitting the importation of opium other than smoking opium for medicinal purposes only.

Section 2 provided for a penalty "if any person shall fraudulently or knowingly *import or bring into* the United States" any opium contrary to law. (Italics ours.)

Section 4 provided that any person subject to the jurisdiction of the United States who should receive or "*have in his possession*, or conceal on board of or *transport* on any foreign or domestic vessel * * * destined to or bound from the United States or any possession thereof, any smoking opium," should be subject to a penalty. (Italics ours.)

Attorney General Wickersham, in construing these sections of the act regulating the importation of opium, held that the bringing of smoking opium into a United States port on one vessel for immediate carriage abroad by another vessel was not legally an "importation" and that such transshipment could lawfully be made. (27 Opinions of Attorneys General, 44.) And Congress considered it necessary to pass an act expressly prohibiting the transshipment of smoking opium as follows:

> "Sec. 5. (*Admission for transportation to another country prohibited.*) That no smoking opium or opium prepared for smoking shall be admitted into the United States, or into any territory under the control or jurisdiction thereof, for transportation to another country, nor shall opium be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose. (38 Stat. L. 276.)"

The situation when the Prohibition Act came before Congress was therefore this:

The Attorney General of the United States had ruled that an act which prohibited the importation, exportation and transportation of smoking opium did not prevent the transshipment of smoking opium from one vessel to another in ports of the United States.

Congress having thus been advised by the Attorney General that the words "import," "or bring into," "have in his possession" or "transport," did not prevent transshipment, adopted that construction and to meet this situation added Section 5 to prevent the transshipment of smoking opium. Therefore in using the words "import," "export" and "transport" in the Prohibition Act, Congress cannot have intended to prohibit the transshipment of liquor.

When the Prohibition Act was drafted it is most natural that the Act prohibiting the importation of opium for any purpose, except medicinal purposes, should have been referred to, for the provisions in regard to medicinal use have a striking similarity, and the acts forbidden, namely, "import," "bring into," "have in one's possession," or "transport," are practically identical. Anyone comparing the two Acts would have seen Section 5 of the opium Act and would have included a similar provision in the Prohibition Act if it had been intended to prevent the transshipment of liquor. Congress having left out such a provision showed an intention not to prevent transshipment.

It is claimed by the Government that the words "transport," "import" or "export" in Section 3 of Title II of the Prohibition Act apply to this

transshipment and this claim of the Government makes it necessary to consider the question whether there ought here to be a literal interpretation of these words or an interpretation which follows the intention of Congress.

POINT IV.

"A thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers."

This rule is so familiar as to need little comment.

In a case which was conceded by the Court to come directly within the letter of the Contract Labor Law, the law was held not to apply because the person under contract was a clergyman. The caption of this point is quoted from the opinion in that case. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 458, 459.

In a case which came directly under the provisions of a Chinese Exclusion Act, it was held that the law did not apply because the person in question had previously lived in the United States. *Lau* v. *United States*, 144 U. S. 47, 61.

In a case which came expressly under the letter of an Immigration Act punishing those who allow aliens to land, except as directed by Immigration officials, it was held that the Act did not apply because the alien landed was a seaman. *Taylor* v. *United States*, 207 U. S. 120.

There was nothing in the three statutes construed respectively in the three cases cited above which referred to a clergyman in the first case, to

former residents in the United States in the second, or to seamen in the third. It was the Court, in each case, which, in carrying out the intent of Congress, declined to apply those acts to cases which could not reasonably be supposed to have been in the mind of Congress when the various Acts were framed. This was effective cooperation between the Legislative and Judicial Departments in promoting intelligent government.

POINT V.

The transshipment here involved is not "transportation" within the prohibition of the Eighteenth Amendment or of the Prohibition Act.

In the case of *United States* v. *Gudger*, 249 U. S. 373, this Court considered the language of the Reed Amendment to the Post Office Appropriation Act of March 3rd, 1917, (39 Stat. 1058-1069). The amendment provided:

> "• • • Whoever shall order, purchase, or cause intoxicating liquors to be *transported in interstate commerce*, except for scientific, sacramental, medicinal, and mechanical purposes, *into any State* or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State." (Italics ours.)

The defendant was a passenger on a railroad train from Baltimore, Maryland, to Asheville, North Carolina, and while the train was temporarily stopped at the station at Lynchburg, Virginia, he was arrested, his baggage examined, and it was found that he had in his valise some seven or more quarts of whiskey. He had no intention of leaving the train at Lynchburg or at any other place in Virginia and his sole intention was to carry the liquor with him into the State of North Carolina to be there used as a beverage. The accused was travelling on a through ticket from Baltimore to Asheville and return.

If the Court was bound there to consider only the most literal meaning of the words of the act, then it must have held that this liquor was "transported in interstate commerce" "into" Virginia, which was a dry state.

The indictment was quashed. Mr. Chief Justice White delivered the Opinion of the Court as follows:

> "Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any State or Territory the laws of which State or Territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into,' as used in the statute, refers to the State of destination, and not to

> the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped."

It cannot be disputed that when this passenger and his baggage were carried from Baltimore to Asheville, both passenger and baggage were "transported in interstate commerce," and it cannot be disputed that this passenger's baggage was transported "into" Virginia.

If the words, "transported in interstate commerce" and "into" had been applied literally and without regard to the purpose of the Reed Amendment, this passenger would have been punished. But this Court, having regard to the purpose of the Amendment, held that it did not include "the movement in interstate commerce through such State to another."

In the present case the Court is asked to follow the same principles and to hold that the words "transportation" and "transport," as used in the Eighteenth Amendment and the National Prohibition Act, refer to the place of destination and not to the means by which that end is reached, and that the movement through the territorial waters of an American port is a mere incident of transportation to the foreign country into which liquor is shipped.

The case of *United States* v. *Gudger* was decided in April, 1919, and the Prohibition Act was adopted in October of the same year. It is only reasonable to suppose that the drafters of the Act, in dealing with this vexed subject of prohibition, had in mind so recent a decision of this Court bearing on this subject.

In *Street* v. *Lincoln Safe Deposit Co.* (November, 1920), 254 U. S. 88, the plaintiff had on storage in a safe deposit company in New York City a quantity of intoxicating liquor which he desired to keep there until he was ready to use it for beverage purposes for himself or his guests and then to take it to his home for such use.

This Court held that this did not violate the National Prohibition Act.

It would have been a vain—almost a frivolous—thing for this Court to hold that the plaintiff could legally possess liquor in storage if he could not legally transport it from the storage warehouse to his home. The Court therefore specifically took up this matter of the plaintiff's right to transport the liquor and held (p. 93):

> "It is equally clear that to permit the owner to have access to the liquors to take them to his dwelling for lawful use is not a delivery of them within the meaning of this third section.
>
> That transportation of the liquors to the home of appellant under the admitted circumstances is not such as is prohibited by the section is too apparent to justify detailed consideration."

If the word "transport," as used in the Eighteenth Amendment and in the National Prohibition Act, is used in the most literal sense, so as to include every carriage of liquor, no matter what the purpose or destination, then obviously the Act would have applied to the carriage of this liquor through the streets of New York to the plaintiff's home. The Court held that the Act did not apply, thus recognizing the ob-

vious principle that the purpose and intent of the Act must be considered in determining whether the transportation in question was prohibited by the Act.

POINT VI.

The transshipment here involved is not "importation" or "exportation" as these words have heretofore been defined by the Federal courts.

However broad the meaning which may be given to these words in common use, it has been judicially settled that as used in the Constitution and Laws of the United States, they have a well-defined meaning which will be applied in all cases where the context does not indicate that a different meaning was intended. Under the decisions, it is not every bringing into, or sending out of, the United States which will constitute "importation" or "exportation."

In *Swan & Finch Co.* v. *U. S.*, 190 U. S. 143, the plaintiff sued to recover drawbacks on oils manufactured from seed imported into the United States and on which duties had been paid, the oils on which the drawback was sought being used as lubricating oils on vessels sailing from the United States in foreign trade. It was held that such carriage of the oils on outward bound vessels did not constitute an "exportation" within the meaning of the Tariff Act. Mr. Justice Brewer, delivering the opinion of the Court, said at page 144:

"Whatever primary meaning may be indi-

> cated by its derivation, the word 'export' as used in the Constitution and Laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Op. Attys. Gen. 583."

In *Flagler* v. *Kidd* (C. C. A. 2nd Circ. 1897), 78 Fed. 341, the action turned on the legality of a seizure made by the defendant, as collector of customs at the Port of Suspension Bridge. Certain spirits belonging to the plaintiff had been withdrawn by plaintiff from a bonded warehouse in Iowa and shipped thence to New York by way of Canada. No Internal Revenue tax was paid thereon, as plaintiff intended to send the liquor from Canada to New York City and to pay the tax there. The liquors were seized by the collector when they reached New York State, and the legality of the seizure turned on the question whether taking the shipment to and through Canadian territory was legally an exportation. The Court held that it was not, and said at page 344:

> "Ordinarily, goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. Goods en route from one place to another in the United States are not exported merely because, while in transit, in cars or vessels, they may be temporarily outside the boundaries, or

> within the boundaries, of a foreign country. Conversely, goods are imported when they are brought within the country with intent to land them here. *The intent characterizes the act, and determines its legal complexion.*" (Italics ours.)

In *U. S.* v. *85 Head of Cattle* (D. C. Mont. 1913), 205 Fed. 679, it was held under a statute authorizing forfeiture of property imported into the United States without the payment of lawful duties, that where cattle, belonging to owners in the Dominion of Canada, strayed across the border into the United States, they were not imported, hence the seizure by Customs officials was unauthorized. The Court said, at page 681:

> "To be 'imported,' it must be of foreign situs, and brought hither by the owner, or with his consent, with intent to be here held, used, consumed, or enjoyed, or to be here incorporated in the general mass of property."

In *The Concord,* 9 Cranch. 387, a shipment was made in August, 1812, by neutral Spanish merchants from Teneriffe to London on the British brig "Concord." She was captured by an American privateer and brought into the Port of New York for adjudication. Pending the prize proceedings these goods were sold by an interlocutory order of the District Court and the proceeds brought into the registry. Upon the hearing the property was decreed to be restored to the complainants without the payment of duties. On appeal it was held that the goods having been sold and consumed in the country the exemption of

duty was erroneous. Mr. Justice Story, delivering the opinion, said at page 388:

> "Where goods are brought by a superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties."

As bearing on the meaning of these words "import" and "export" it has already been noted that after the adoption of the Act of Congress prohibiting all importation of smoking opium, Attorney General Wickersham held that the bringing of such opium into a United States port on one vessel for immediate exportation by another was not legally an "importation" and that such transshipment could lawfully be made. 27 Opinions of Attorneys General 440. It will be noted that this opinion was rendered before the statute was passed prohibiting the transshipment of smoking opium.

In the present case the transshipment of these five cases was not "a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country. (*Swan & Finch Co.* v. *U. S., supra.*) Nor was there any "importation" of this shipment which would correspond to the definitions and precedents above referred to.

The above, being the legal definition of the

words "import" and "export," it should be presumed that they were used in this sense in the Eighteenth Amendment and in the National Prohibition Act; and these words should not be held to extend to a mere transshipment in an American port in the absence of any language requiring such construction.

POINT VII.

Even if it could be held that the transshipment here involved amounts legally to "importation" or "exportation" such transshipment does not constitute "importation" or "exportation" within the prohibition of the Eighteenth Amendment or of the Prohibition Act.

This is so for the reasons already given in cases where an act may come within the letter of a statute and yet not be covered by the statute because not within the intent of Congress.

Turning, then, from what Congress did not mean here by using the word "export" to an inquiry as to what it probably did mean, we have to meet this state of facts: The United States Government was seeking to prevent the use of alcoholic beverages by persons subject to its jurisdiction. It is well known that this use of alcoholic beverages has been opposed partly on economic

grounds, but also on moral grounds; and it would have put the United States in an unfortunate moral position if the Eighteenth Amendment and the Prohibition Act had still left it possible for Americans to ship to other countries beverages, the use of which was considered immoral and uneconomic in the United States. And it is therefore not surprising that the framers of the Eighteenth Amendment and of the Prohibition Act made use of the words "exportation" and "export" so as to put the United States in a proper moral position in this regard.

It may be said in answer to the above, that if Americans could not manufacture alcoholic beverages, there would be nothing to export. But it is well known that some liquors are much improved by an ageing process and that there are, therefore, at all times great quantities of bonded liquors stored in the United States. After the Prohibition Act took effect it became illegal to sell this bonded liquor in the United States for beverage purposes, but if the Act had contained no reference to "export," its owners might have freely exported it so long as it lasted and the United States would have been put in the position of being willing to make money out of a traffic which was too uneconomic and too immoral to be practised where citizens of the United States were to be consumers. This situation would furnish a sufficient reason for prohibiting "export" in the Eighteenth Amendment and Section 3, of Title II, of the Prohibition Act.

The existence of these large quantities of bonded liquors was evidently recognized by Congress in framing the Prohibition Act, for the subject is

repeatedly dealt with. For example: The proviso added to Section 3 of Title II permits the purchase and sale of warehouse receipts covering liquor in bond. Section 37, Title II, permits the storage of liquor in bonded warehouse and the transportation of liquor to and from such warehouse on permit. Section 13 of Title III provides for the issuance of regulations covering, among other things, bonded warehouses.

It is therefore clear that Congress had not forgotten these stores of liquor in bond, and unless the framers of the Eighteenth Amendment and of the Prohibition Act were willing to put the nation in the position of making money out of a traffic too injurious to be carried on at home, it was necessary to use the word "exportation" in the Amendment and the word "export" in Section 3, Title II of the Act, as was done.

POINT VIII.

The inherent character of this merchandise does not require its exclusion and Congress has provided that liquor may be imported for medicinal and other non-beverage purposes.

The merchandise here involved is not so essentially dangerous in itself that its mere physical presence and movement within our borders, however guarded, might expose our people to danger.

This distinction will be seen for example by comparing a shipment of liquor with a shipment

of hides which had not been properly disinfected in accordance with U. S. regulations. Obviously, hides in such condition might expose our people to disease if allowed to be handled at all within our territory, and the Customs Regulations for Transshipment prohibit transshipment in bond of such hides. (Article 694.)

The Eighteenth Amendment and the Prohibition Act do not treat the presence or movement of alcoholic liquor in United States territory and territorial waters as something so dangerous to the people of the United States that it must be altogether prohibited. The Amendment and the Act permit importation for non-beverage purposes, and, compared with that movement of liquor, this transshipment business is a trifle.

This matter of protecting the people against illegal landing has been expressly dealt with in Acts of Congress and ample powers are given to the Treasury Department to protect the people.

The general statute under which these transshipments have been made since 1900 is Section 3005, Revised Statutes, which provides:

> "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Under this section the Secretary of the Treasury has power to make such regulations as to examination and transportation as he sees fit, so

whatever danger of leakage there is may be dealt with by the Secretary of the Treasury without action on the part of Congress.

The Repeal clause of the Prohibition Act (Section 35, Title 2) provides:

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. * * *"

Under present Revenue Laws a duty must be paid on liquor imported for non-beverage purposes (38 St. L. 114, Schedule H; Act Oct. 3, 1913, § 237) therefore by the clause quoted above the Prohibition Act does not excuse the payment of these duties. It being, therefore, necessary now, as before prohibition, to collect duties on liquor actually imported, it is as necessary now, as it was before prohibition, that Section 3005 of the Revised Statutes above quoted should remain in force in respect to liquor which is not imported but which only temporarily passes through the port.

POINT IX.

A special Federal Statute has long existed permitting the transshipment in our ports of merchandise destined for a foreign country, and a general statute such as the Prohibition Act, does not repeal such a special statute "unless the repeal be expressed or the implication to that end be irresistible."

It has been noted above that Section 3005, U. S. Revised Statutes, passed May 31, 1900, provides:

> "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house, and conveyed in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Section 3005 was followed by clauses relating to the making of declarations, giving of bonds, etc.

By Title II, Section 35 of the National Prohibition Act, it is provided:—

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

Various provisions will be found in the Revised Statutes relating to the handling of intoxicating

liquor which under the provisions of Title II, Section 35, of the Prohibition Act, above quoted, must still be considered in force.

For example, Section 2775 of the Revised Statutes provides that the master of any vessel having on board distilled spirits or wines, shall within forty-eight hours after his arrival report the quantity and kinds of spirits and wines on board such vessel as sea stores in writing to the surveyor or officer acting as Inspector of the Revenue of the port at which he has arrived.

It is evident that Section 2775 related to intoxicating liquors which are not to be used for beverage purposes in the United States and it is, therefore, not inconsistent with the provisions of the National Prohibition Act.

It has been already noted that duty is charged on liquor imported for non-beverage purposes, and Section 3005 is required now as much as it was before prohibition to cover the case of liquor which temporarily comes into our ports for transshipment, but which is not imported. It is submitted, therefore, that Section 3005 is not inconsistent with the Prohibition Act and that it does not come within the repealing clause of that Act.

It cannot be said that Section 3005 has been repealed, for it is a necessary part of the legal machinery of the nation for merchandise which passes through the country or through the territorial waters but without being imported, and it applies to "all merchandise."

It cannot have been repealed in so far as it applied to liquor intended for beverage purposes, unless it was intended by the Eighteenth Amendment and by the Prohibition Act to regulate

beverages of the citizens of other nations, and the phraseology of the Eighteenth Amendment would seem to negative such a claim.

As previously noted in this brief, when Congress was dealing with smoking opium, which could not be imported at all into the United States, it expressly dealt with this subject of transshipment and took smoking opium out of the merchandise which could otherwise have been transshipped under this section. Congress has made no such exception in respect to liquor intended for beverage purposes in other nations, and it is submitted that Section 3005 therefore applies to the shipment involved in this case.

Repeals by implication are not favored and usually occur only where there is such irreconcilable conflict between the earlier and later statutes that effect reasonably cannot be given to both. The courts have also laid down the rule that where there are two statutes upon the same subject, the earlier being "special" and the later "general," the presumption is, in the absence of an express repeal or an absolute incompatibility that the "special" is intended to remain in force as an exception to the "general."

The Court said in *Ex Parte United States*, 226 U. S. 420—

> "When the issue is thus narrowed, solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible."

In *Washington* v. *Miller*, 235 U. S. 422, the Court said,

> "In these circumstances, we think there was no implied repeal and for these reasons: First: Such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (U. S. *v.* Healey, 160 U. S. 136, 146; U. S. *v.* Greathouse, 166 U. S. 601, 605.) Second: Where there are two statutes upon the same subject the earlier being special and the later general the presumption is, in the absence of an express repeal, or an absolute incompatability that the special is intended to remain in force as an exception to the general (Townsend *v.* Little, 109 U. S. 504, 512; *Ex parte* Crow Dog, Id. 556, 570; Rodgers *v.* U. S. 185 U. S. 83, 87 and 89), and Third: There was in this instance no irreconcilable conflict or absolute incompatibility for both statutes could be given reasonable operation if the presumption just named were recognized."

POINT X.

It is inherently improbable that Congress can have intended to prohibit these transshipments when it framed the Prohibition Act.

In adopting nation-wide prohibition the United States Government made one of the greatest experiments attempted in our history. And the thing which the friends of prohibition had chiefly

to fear was a reaction of popular opinion which would cause a change in the law and not minor violations of the law.

It was certain that there would be violations and the usual method which has been adopted by Congress to minimize violations has been to give to an executive department power to make regulations dealing with details. Such a power had already been given to the Treasury Department with respect to the safeguarding of these transshipments (Statutes § 3005).

But the great danger to prohibition was reaction. Prohibition has had a long and checkered history in the United States. It has repeatedly been tried by States, and parts of States, and then later abandoned when its actual working has antagonized classes of the people who had not originally opposed it.

This nation-wide prohibition of 1919 was particularly open to reaction. It had been adopted at about the same time as war prohibition; most of the States had considered the Eighteenth Amendment in war time and the war impulse had much to do with the adoption of the amendment. Peace was sure to put a strain on any drastic legislation adopted under such circumstances. And it is improbable that Congress intended to invite reaction by giving to a part of the Act what is practically an extra territorial effect.

These shipments are not our commerce; they are the commerce of other nations and our interference with them is an interference with the commerce of other nations, and we have every reason to assume that this interference will be resented. Such action on our part might, there-

fore, well lead to action by foreign countries which would seriously affect American exports.

Our principal foreign commerce is with nations whose people do not agree with us on the subject of prohibition, and an application of our prohibition laws to interfere with a trade which was theirs and not ours might stir up an irritation out of all proportion to the real importance of the interference.

To whatever extent retaliation by other countries affected our exports, it would affect that large body of our citizens who are interested in exporting or in producing what is exported. And this might well enlist against prohibition many of our citizens not previously opposed to it but who would become its enemies when they found that their business was being interfered with because we had interfered with something which really did not concern us.

Such are the situations out of which reactions grow, and it seems altogether improbable that Congress can have intended to invite any such international friction and possible complications.

POINT XI.

If the National Prohibition Act be construed as prohibiting transshipments of the kind here involved, it is unconstitutional. Such a construction ought therefore to be avoided.

The Eighteenth Amendment prohibits "manufacture, sale, or transportation of intoxicating

liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

This is the sole provision of the Constitution under which Congress had authority to enact the Prohibition Act.

That Act can not be upheld under the commerce clause, for in the *Trade Mark cases*, 100 U. S. 82 at page 96 this Court held

> "• • • we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.
>
> "When therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of

> Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The provision of law on which the Government relies is Section 3 of Title II of the Prohibition Act which reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act."

This provision of law is therefore expressly connected with the Eighteenth Amendment as an enforcement of that amendment and it is plain that Congress in using this language intended to enforce the Eighteenth Amendment and not to exercise the powers given to it under the commerce clause of the Constitution.

A statute enacted pursuant to a constitutional amendment which authorizes Congress to enact laws for the enforcement of the rights secured by such amendment, is void if it is broader than the amendment which it is designed to enforce.

U. S. v. *Reese*, 92 U. S. 214, was based on an indictment against two inspectors of a municipal election in Kentucky for refusing to receive and count the vote of Garner, a citizen of the United States of African descent.

The case arose under the statute passed by Congress to carry into effect the Fifteenth Amendment which had provided that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The first section of that Act provided that all citizens otherwise qualified should be entitled to vote without distinction of race, color, etc.

The second section provided a punishment for any officer charged with the duty of furnishing to citizens an opportunity to perform any act which was a prerequisite of voting, who should omit to give all citizens equal opportunity on account of race, color, etc.

The third section provided that whenever, under the Constitution or Laws of a State, an act is required to be done by a citizen to entitle him to vote, the offer of the citizen to perform the act should be held to be a compliance with the law if the act failed to be carried into execution by reason of the wrongful act of an officer charged with the duty to act thereon, and further providing that the officer who shall wrongfully refuse to count the vote shall be subject to certain penalties.

The fourth section provided for the punishment of any person who should by force, bribery or other unlawful means hinder any citizen from doing any act required to be done to qualify him for voting.

It will be observed that the first and second sections of the Act related to discrimination based on race, color, and previous condition of servitude, but that sections third and fourth re-

lated to interference with the right of a citizen to vote, but without specific reference to discrimination by reason of race, color, etc., to which the Fifteenth Amendment had related.

The indictment was under the third and fourth sections. The Court gave judgment for the defendants and held that the power of Congress to legislate on the subject of voting in State elections rested upon the Fifteenth Amendment, and that this power could be exercised only by providing punishment when the wrongful refusal to receive the vote was based on the race, color, etc., of the citizen, and did not extend to discrimination not based on race, color, etc.

To the same effect is the case of *Karem* v. *U. S.*, 121 Fed. Rep. 250, where the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton writing, held on appeal that an Act of Congress could not be sustained as an exercise of the power given by the Fifteenth Amendment where the Act is broader in its terms than the Amendment, and where the language used covers wrongful acts without as well as within the terms of the Amendment.

The jurisdiction of Congress as to prohibition of intoxicating liquors being confined, in express terms by the Amendment, to liquor for beverage purposes within the territory of the United States, the provisions of the National Prohibition Act are of no effect if they be construed as covering acts both within and without the jurisdiction of Congress as defined by the Eighteenth Amendment.

POINT XII.

The laws of Congress are always to be construed so as to conform to the provisions of a treaty if possible to do so without violence to their language.

Article XXIX of the Treaty of Washington between the United States and Great Britain provided as follows:

> "It is agreed, that for the term of years mentioned in Article XXXIII of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.
>
> "It is further agreed that, for the like period, goods, wares, or merchandise arriving at any of the ports of her Britannic Majesty's possessions in North America, and destined for the United States, may be

> entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations, and conditions for the protection of the revenue as the governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions."

(There has been some discussion of the question whether Article XXIX of the Treaty of Washington was repealed in 1883. The documents bearing on that subject are referred to in Appendix B of this brief. It is submitted that an examination of these will show that Article XXIX is still in force.)

To reverse the policy of the country which has rested for so many years on the provisions of treaties and the comity of nations, particularly to do this on mere implication, would run counter to the policy and practice of our Government.

In the case of the *United States* v. *43 Gallons of Whisky*, 108 U. S. 491, the Court considered the effect of a statute imposing a Special Internal Revenue tax for selling liquors in connection with the provisions of a treaty with Chippewa Indians which prohibited the introduction and sale of spirituous liquors in the Indian country. The court decided that the payment of the tax did not exempt the owner of the goods

from the penalty imposed for selling liquor to Indians. Justice Field said (p. 496):

> "Congress never intended to interfere with the operation of the treaty, or to sanction the sale of liquors in any ceded territory where an express stipulation provides that they shall not be sold * * *. It would require very clear expressions in any general legislation to authorize the inference that Congress purposed to depart from its long-established policy in regard to a matter of so vital importance to the peace and to the material and moral well-being of these wards of the nation. There is also another consideration. *The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.* This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States." (Italics ours.)

In the case of *Lem Moon Sing* v. *United States*, 158 U. S. 538, Mr. Justice Harlan in considering the effect of the Chinese Exclusion Acts on the treaties between the United States and China and after taking into consideration the various Acts of 1892 and 1894, decided that the treaty rights had been annulled by the provisions of the Act in 1894. The court said, p. 549:

> "If the Act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under exist-

ing laws or treaties, and was improperly excluded. But when Congress went further, and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers 'from admission into the United States under any law or treaty,' such decision should be final, unless reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away. *United States* v. *Rodgers*, 65 Fed. Rep. 787. If the Act of 1894, thus construed, takes away from the alien appellant any right given by previous laws or treaties to reenter the country, the authority of Congress to do even that cannot be questioned, *although it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. Chew Heong* v. *United States*, 112 U. S. 536, 539, 559; *Head Money Cases*, 112 U. S. 580, 599; *Whitney* v. *Robertson*, 124 U. S. 190, 195; *Chinese Exclusion Case*, 130 U. S. 581, 600. There is no room in the language of the Act of 1894 to doubt that Congress intended that it should be interpreted as we have done in this case." (Italics ours.)

The National Prohibition Act contains no language which indicates that Congress intended to abrogate the treaty provisions as to transshipment of liquor from ports in Great Britain to ports in her North American possessions. Indeed, the implications are entirely the other way, for the Act itself deals only with the use of liquor as a beverage in this country and modifies the existing laws only to the extent that is nec-

essary to carry out this intention. Congress recognizes this, for, as noted above, the 35th section provides that the provisions of the National Prohibition Act shall be construed as in addition to existing laws.

Congress has power to abrogate a treaty by statute which provides to that effect, but it is submitted that Congress did not exercise that power with respect to these treaty rights when it passed the National Prohibition Act.

POINT XIII.

The allegations of the answer in reference to the theft of liquors pending transshipment and in reference to the unlawful landing of liquor are not here relevant.

A.

Thefts of Transit Shipments by Railroads.

Aside from the fact that these thefts are crimes which are not here relevant, there is a wide practical distinction between the carriage of liquor for distances of some hundreds of miles across territory of the United States to one of our ports as contrasted with transshipment in the port itself. This transshipment in a port is frequently done by lighter, so that the merchandise never physically rests even on a pier, and, as this case presents merely marine transshipments, it is submitted that thefts from railroads are not at all material.

B.

Thefts Pending Transshipments in Port.

The thefts alleged under this heading all occurred some time after the Act was framed. Under the method of transshipment as explained in the pleadings, it will be seen that these thefts occurred while under the control of customs officers.

Section 3005 of Revised Statutes, above referred to, gave the Secretary of Treasury full power to make any necessary regulations in reference to carrying the transshipped goods and there is no reason to suppose that Congress assumed that Government officials would fail to discharge a duty imposed upon them where there was ample power to make any needed regulations or to adopt any necessary precautions.

Under the Prohibition Act liquor can be imported for non beverage purposes under regulations of the Treasury Department (Title II, Sec. 3). Under Section 3005 liquor can be transshipped under regulations of the Treasury Department. Congress was satisfied that Treasury regulations were a sufficient protection against leakage in the first case and there seems no reason why such regulations are not a sufficient protection in the second.

The statistics given in Exhibit A, annexed to the answer, show what was stolen in two years from nineteen shipments which arrived on vessels of the complainant, but no statement is made as to the shipments from which there was no theft. So, it is impossible to determine exactly

from these statistics what the proportion of the loss was as compared with the total amount shipped during the period set forth in the answer.

The amount arriving at the Port of New York on complainant's vessels for transshipment during the calendar years 1918, 1919 and 1920 is set forth in Exhibit A annexed to the complaint. This exhibit shows the large quantities of liquor shipped to New York for transshipment and that the losses set forth in answer are small compared with the amounts transshipped.

Exhibit B annexed to the answer shows the number of shipments in vessels belonging to others in which there were losses but there is nothing to show the large number of shipments in which there were no losses.

The total of the shipments of cases in Exhibit B, exclusive of the shipments in barrels, shows that less than 269 cases out of a total of 23,097 cases coming into the Port of New York by steamship for transshipment in the port were lost and these do not include shipments where there were no losses.

C.

Illegal Landing of Liquor.

The illicit landing in the United States of liquor brought from foreign countries is "importation" (see cases under Point VI). This is expressly prohibited by the National Prohibition Act. It is therefore just as illegal now as it would be if the courts should hold that no foreign vessel can enter our territorial waters with liquor abroad.

The acts complained of by the defendant are a crime, and the reason this crime is not prevented is because some of the criminals have not been caught and not because there is not a statute already in force to cover their offense.

The illicit landings, to which the defendant refers, are from vessels clearing from Nassau in the Bahama Islands documented for Halifax. As a practical matter, an examination of charts and globes will show that the true course for vessels between those ports is a long distance off our coast, and if any vessel so bound, and not obviously in distress, appears in our territorial waters, her presence there would require explanation. And if, in addition to this, she were found in such territorial waters, hove to or anchored, and with liquor aboard, these circumstances would require a great deal of explanation. The difficulty is not caused by absence of statute but it is the practical difficulty of catching the criminal.

This offense of illicitly introducing liquor is analogous to smuggling, and there would seem to be no more reason for prohibiting the carriage of liquor over our territorial waters to prevent this crime than there would be for prohibiting carriage over those waters of any other sort of merchandise to prevent the crime of smuggling.

POINT XIV.

The provisions of the Prohibition Act in reference to transportation through the Panama Canal do not affect the subject under consideration.

(This subject is referred to only because the Assistant Attorney General referred to it in his opinion of 4 February, 1921.)

In the National Prohibition Act the provisions as to the Canal Zone are not included in the general provisions relating to the United States, but a special section (Title III, Sec. 20) was incorporated in the act to deal with the Canal Zone. This Section 20 places the Canal Zone in a special position, for in addition to the provisions against importation, manufacturing, selling and transportation, it is made unlawful to "have in one's possession or under one's control within the Canal Zone, any alcoholic liquors except for sacramental, scientific, pharmaceutical, industrial or medicinal purposes." As contrasted with this, the provisions of Sec. 33, Title II, which relate to the United States, provide: "It shall not be unlawful to possess liquors in one's private dwelling, while the same is occupied and used by him as his dwelling only and such liquor need not be reported."

The Canal Zone is thus recognized by Congress as being different from continental United States in its position and requirements. Congress has not therefore relied merely upon the general provisions of the act for the regulation of this specially situated possession, but has provided for it

by this separate Section 20 of Title III, and, as above noted, has made the zone absolutely dry, while this cannot be said of the provisions of the act applying to the United States. This Section 20 of Title III took effect before the Eighteenth Amendment was in force (Prohibition Act Title III Sec. 21) and the direct power of Congress over the Zone made special legislation possible. (10 U. S. compiled statutes § 10031.)

In Section 20 occurs this proviso: "provided that this *section* shall not apply to liquor in transit through the Panama Canal or in the Panama Railroad." (Italics ours.) It will be noted here that Congress has not said that the act shall not apply, but that it is the section which shall not apply, thus recognizing the fact that the Canal Zone is dealt with in a special way and under a special section.

Under these circumstances, it cannot be that by referring in this Section 20 to carriage in the Panama Canal and on the Panama Railroad Congress intended that that was the only transportation of liquor which could take place anywhere in the United States or its possessions. Section 20 being the only provision which applies to the Canal Zone it was necessary to make that section complete by dealing with the Canal traffic. This proviso serves thus to complete Section 20. It has no bearing on the interpretation of the Act itself in its application to the United States. It does however indicate an intention on the part of Congress not to interfere with the commercial carriage by other nations of liquor which is not intended for use in United States territory for beverage purposes.

LAST POINT.

The final decree of the District Court in favor of the defendant-respondent should be reversed and the cause remanded to the District Court with instruction to enter a decree granting the relief prayed for in the Bill of Complaint.

Respectfully submitted,

LORD, DAY & LORD,
Solicitors for the Anchor Line (Henderson Brothers) Ltd.

LUCIUS H. BEERS,
FRANKLIN B. LORD,
ALLEN EVARTS FOSTER,
Of Counsel.

APPENDIX A.

Opinion of Attorney General.

TRANSIT SHIPMENTS OF LIQUOR TOUCHING AT PORTS OF THE UNITED STATES.

Department of Justice,
February 4, 1921.

SIR:

This will acknowledge receipt of your request for an opinion as to whether the Eighteenth Amendment to the Constitution and the National Prohibition Act prohibit or affect in any way "in transit" shipments of liquor for beverage purposes touching at the ports of or moving through the United States when originating in and destined to foreign countries under the provisions of Section 3005 of the Revised Statutes as amended by the Act of May 21, 1900.

Section 3005, Revised Statutes, as amended is as follows:

> "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Section 3 of the National Prohibition Act provides:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect,

manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor *except as authorized* in this Act * * *."

By virtue of this provision any and all dealings in intoxicating liquors for beverage purposes within the jurisdiction of the United States are prohibited, except in so far as authority therefor may be found elsewhere in the Act. Nowhere therein is transportation for beverage purposes authorized; except that the prohibitions of Section 20 of Title III, which prohibits the importation or introduction into and the manufacture, sale, transportation, etc., within the Canal Zone, are made inapplicable to liquor in transit through the Panama Canal or on the Panama Railroad. By expressly excepting transportation through the Panama Canal and on the Panama Railroad it is to be assumed that Congress intended that transportation elsewhere should be prohibited.

By virtue of Section 33 of Title II, the possession of liquor for beverage purposes is permitted in the home, provided same is for the personal consumption only of the owner thereof and his family and bona fide guests. No other possession for beverage purposes being authorized, no other possession is lawful.

In the absence of express authorization, in order to arrive at the conclusion that liquor for beverage purposes arriving at any port of the United States destined for any foreign country may be entered at the custom-house and conveyed, in transit, through the territory of the United States, it would be necessary to hold either that such liquor while in transit is neither possessed

nor transported within the United States, or that the Prohibition Act does not apply to liquor not intended for beverage consumption within the United States. Neither of these positions is tenable. The word transport as used in the Act must be presumed to have its usual meaning, viz: to carry or to convey from one place to another, the taking up of persons or property at some point and putting them down at another (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196); and whether the possession during transportation be in the carrier (which I think it is) or in the owner, both transportation and possession are within the territory of the United States. In the second place the Act is not in terms limited to liquor intended for beverage purposes within the United States. By Section 1 of Title II "liquor" and "intoxicating liquor" are defined to include any liquors containing over one-half of one per cent. of alcohol by volume which are fit for beverage purposes; and by Section 2 the manufacture, sale, etc., of such liquors are prohibited except as authorized, regardless of the place where they are intended to be consumed. This is obvious from the prohibition upon their exportation.

Having arrived at the conclusion that liquor in transit through the United States would be both transported and possessed in violation of the National Prohibition Act, it is not necessary for the purposes of this opinion to determine whether the procedure established by Section 3005, Revised Statutes, would involve either prohibited importation or exportation.

The National Prohibition Act applies to all the territory of the United States that is not otherwise excepted from its operation, and extends to

all waters within its territorial limits, including a marine league from the shore; within those waters the manufacture, sale, transportation, possession, etc., is prohibited.

My conclusion therefore is that the provisions of Section 3005, Revised Statutes, do not apply to intoxicating liquors for beverage purposes, and that the National Prohibition Act prohibits "in transit" shipments of such liquors touching at the ports of or moving through the United States, though same originate in and are destined to foreign countries.

Respectfully,

FRANK K. NEBEKER,
Acting Attorney General.

To the Secretary of the Treasury.

APPENDIX B.

NOTES ON QUESTION WHETHER ARTICLE XXIX OF TREATY OF WASHINGTON IS STILL IN FORCE.

The Treaty of Washington proclaimed July 4th, 1871, between the United States and Great Britain, referred primarily to the Alabama Claims. A few other international subjects were, however, dealt with, as follows:

Articles XVIII to XXV inclusive, known as the "fishery" articles, related to that subject.

Articles XXVI to XXVIII inclusive, related to the navigation of the Great Lakes and connecting canals.

Article XXIX, which is here important, related to the subject of carriage in bond and it provided that "It is agreed that for the term of years mentioned in Article XXXIII" merchandise arriving at certain ports of the United States and destined for British possessions might be carried in bond without payment of duties.

Article XXX provided that "for the term of years mentioned in Article XXXIII of this treaty" citizens and subjects of the two countries might carry merchandise without duty on the waters of the Great Lakes and St. Lawrence River.

Article XXXI provided for carriage of lumber, without duty, on the St. John's River.

Article XXXII provided that the "fisheries" articles (XVIII to XXV) shall extend to the Colony of Newfoundland as far as applicable.

Article XXXIII of the treaty, above referred to, was the one which regulated the application of such articles as particularly affected Canada; that is, the "fisheries" Articles XVIII to XXV above referred to and Article XXX which, as noted above, related to the navigation of the Great Lakes and the St. Lawrence River, and this Article XXXIII provided.

> "The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain

> in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of said period of ten years or at any time afterward."

It will be observed that the provisions of Article XXXIII, relating to termination, applied only to the "fisheries" Articles XVIII to XXV, and to the Great Lakes, Article XXX, and that they did not refer to Article XXIX, which referred to carriage in bond.

On March 3, 1883, a joint resolution was passed by Congress to give notice on July 1 following, of the termination of Articles XVIII to XXV, inclusive, and of Article XXX of the Treaty of Washington. This resolution was transmitted to the American Minister in London, April, 1883, and communicated to the British Government in the same month, and on July 2nd, 1883, formal notice of termination was given.

In July, 1887, the Secretary of State (Mr. Bayard) sent a communication to the Secretary of the Treasury in reply to an inquiry from the latter, whether Article XXIX of the Treaty of Washington was still in force. (S. Ex. Doc. 40, 52 Cong. 2 Sess. 11.)

In that communication Mr. Bayard reviews what has been stated above and says:

> "• • • it does not appear that either Article 29 or Article 30 was so united with

the fisheries articles that neither could stand without the latter. Such was unquestionably the view both of the Senate and the House of Representatives when, without a division, they passed a joint resolution directing the notice of termination of Articles 18-25 and Article 30 to be given, and repealed the legislation which had been adopted to carry them into effect. The records of the debates of both bodies show that the only question raised in either House as to the resolution directing notice to be given was whether that part of the resolution which repealed the legislation carrying into effect the articles directed to be terminated would affect the provisions of the Act of March 1, 1873, which gave effect to Article 29. And it was in order to avoid the repeal of those provisions by implication that the provisions that the Act of 1873 should be repealed 'so far as it relates to the articles of said treaty so to be terminated' was inserted. Those words were not in the resolution as originally reported to the Senate, but were inserted to meet the objection above stated.

"You will also see, by a memorandum accompanying this letter, that in the debates in Congress during the last session on the various bills introduced in relation to the Canadian fisheries, it was generally understood and stated that Article 29 remained in force.

"But the best evidence that the notice of termination of Articles 18-25, inclusive, and Article 30, was not intended or supposed by Congress to affect the continued existence of Article 29, is the fact already adverted to that the provisions of the Act of March 1, 1873, carrying into effect the stipulations of

that Article, were not included in that clause of the resolution of 1883 which repealed the municipal legislation enacted to carry certain articles of the treaty, including Article 29, into effect, and it would, therefore, seem that the transit of goods in bond, according to the terms of Article 29, is still authorized by Act of Congress."

In view of the controversy which later developed on the question of whether Article XXIX was or was not terminated in 1883, it is important to note that *the only action which could have served to terminate any article of the Treaty was the joint resolution of Congress of March 3, 1883. That resolution did specifically direct the termination of Articles XVIII to XXV and Article XXX. The resolution did not refer to Article XXIX,* and Section 3 of the resolution referred to the Act of Congress of March 1, 1873, which had been passed to carry into effect the Treaty of Washington, and provided that that act "so far as it relates to the articles of said Treaty so to be terminated shall be and stand repealed." (22 U. S. Statutes, 641.)

In a message sent by President Cleveland to Congress in 1888, he took the ground that Article XXIX had been terminated by the Congressional and executive action above referred to, basing his conclusion on the reference made in Article XXIX to the "terms of years mentioned in Article XXXIII." (H. Ex. Doc. 434, 50 Cong. 1 Sess.)

It is submitted that a study of Articles XVIII to XXXIII of the Treaty of Washington will show that certain of them would have to depend on the passage of statutes by four legislative

bodies, viz., the British Parliament, the Parliament of Canada, the Legislature of Prince Edward's Island, and the Congress of the United States, and as it was intended that certain of these sections should remain in force for ten years, not from the date of the Treaty but from the date in which the articles should come into operation, it was necessary in defining this time to refer to the action of these four legislative bodies.

It would have involved cumbrous repetition quite unsuitable in a document of this character to have referred in each of the sections of the Act to action by these four bodies as fixing the time when the article should come into operation. To avoid this repetition the framers of the Treaty devoted one entire article (Article XXXIII) to this subject of the passage of laws by these four different legislative bodies, and provided that such assent having been given, the articles should remain in force for a period of ten years from the date at which they might come into operation; and further, until the expiration of two years, after either of the high contracting parties gave notice to the other of its wish to terminate the same, and, for the sake of brevity, when they were referring to this ten-year period in Articles XXIX and XXX, they called it "the term of years mentioned in Article XXXIII."

This reference to Article XXXIII was evidently to avoid lengthy repetition. But the Treaty did not say, and Congress did not say, that all articles which were to continue for this period were so connected that the termination of one would terminate all.

No notice was given by the United States Gov-

ernment of any intention to terminate Article XXIX and Congress did not direct such notice to be given.

A number of Senators, including Senators Edmunds and Sherman, in speaking before the Senate, dissented from President Cleveland's opinion that Article XXIX was not in force (Cong. Record, Aug. 25, 1888, 50 Cong. 1 Sess. XIX 7904, 7906 and 7919). Both the majority and minority report of the Senate Committee on Foreign Relations, in relation to another Treaty, took the ground that Article XXIX of the Treaty of Washington was then (1888) in force. (S. Report 3, 50 Cong. 1 Sess. 14, 41.)

It is important to observe that some of the best constitutional lawyers of the country, including Senators Sherman, Edmunds, Evarts and Frye, joined in this report.

Later, President Harrison in a message took the view that Article XXIX had been abrogated, but it will appear by a communication from Mr. Sherman, as Secretary of State, to the Secretary of the Treasury, as late as 1898, that the old question as to whether or not Article XXIX had been abrogated was still regarded as an open one at that time (224 MS. Dom. Let. 260).

(See Moore's International Law Digest, Vol. V, pp. 327-335, for discussion of this subject.)

From what has been stated above, it is submitted that the group of eminent constitutional lawyers who were in the Senate thirty years ago were right in their view that Article XXIX of the Treaty of Washington had not been abrogated. And, if so, then the provisions of that article ought to be considered in passing on this question.

The theory that Article XXIX was intended to be terminated in 1883 apparently grows out of a statement contained in the account of the negotiations of the Joint High Commissioners who negotiated the treaty. Their statement was:

> " 'The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force.' "
>
> *V Moore's International Law Digest*, p. 331.

The suggestion in this statement is that this right of transshipment was given by the treaty in some way as an equivalent for the privileges given in the fisheries articles, and that as the fisheries articles were terminated the transshipment article ought also to be terminated.

Whatever the Commissioners may have had in mind in their various discussions, it is submitted that we must now follow the terms of the treaty which they framed and which was finally ratified. There is nothing in the treaty to indicate that Article XXIX was to be terminated if the fisheries articles were terminated, and as this was a solemn international instrument, prepared and considered with great care, it is submitted that it is improper—by referring to the notes of the Commissioners—to inject something into the treaty which neither they nor the governments concerned inserted in the treaty.